**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT**

**JAIPUR BENCH, JAIPUR**

Satya Narayan Garg
Vs.
Kanhaiya Lal Pyare Lal Gotewala & Anr.

S. B. CIVIL FIRST APPEAL NO.123/1987
UNDER SECTION 96 OF THE CIVIL PROCEDURE CODE AGAINST THE JUDGMENT AND DECREE DATED 2.7.1987 PASSED BY THE ADDITIONAL DISTRICT JUDGE, NO.2, AJMER IN CIVIL SUIT NO.389/85(18/79).

Date of Judgment :: 18th September, 2007

**PRESENT**

**HON'BLE DR. VINEET KOTHARI, J.**

Mr.G.K. Garg for the appellants.

Mr.S.M. Mehta, Sr. Adv. assisted by
Mr. Anil Mehta for the respondents.

**REPORTABLE**
**BY THE COURT:**

1. This is defendant's first appeal under Section 96 of the Civil Procedure code against the judgment and decree of eviction dated 2.7.1987 passed by the learned Additional District Judge, No.2, Ajmer decreeing Civil Suit No.389/85 (18/79) whereby the learned trial Court decreed the plaintiff's suit for arrear of rent and eviction.

2. The facts in brief are that the plaintiff, Kanhaiya Lal Pyare Lal Gotewala gave his portion of property situated at 1193/28, Adarsh Nagar, Ajmer to M/s. Mala Tiles whose proprietor at the relevant time i.e. on 16.7.1971 was Smt. Krishna Gupta, defendant No.1 and her power of attorney holder, Shri Satya Narain Garg, defendant No.2, who was also close relative, namely, sister's husband of defendant No.1, Smt. Krishna Gupta, looked after the business of manufacturing of the tiles in the said suit premises. The rent was paid @ Rs.175/- per month and in the first instance, the rent for six months was paid by the tenant vide receipt (Ex.1) for a period of six months, namely, Rs.1050/-. It was further the case of the plaintiff that on 8.8.1975, the said business of M/s. Mala Tiles was assigned or sold by the defendant No.1, Smt. Krishna Gupta, to defendant No.2, Satya Narain Garg, who was earlier her power of attorney holder and thus, the defendant No.1, Smt. Krishna Gupta, had parted with the possession of the suit property to the said Shri Satya Narain Garg and, therefore, the plaintiff-landlord became entitled to a decree of eviction. The aforesaid suit was decreed by the learned trial Court in favour of the plaintiff and, therefore, the defendant No.2, Satya Narain Garg, has filed the present appeal before this Court.

3. The only point pressed before this Court in the present

appeal is that there was no case of parting with the possession made out by the plaintiff-landlord and, therefore, the decree of eviction could not be granted by the learned trial Court. Section 13 of the Rajasthan Rent Control Act, 1950 enumerating the grounds of eviction of tenant vide clause (e) thereof provides, "*that the tenant has assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without any permission of the landlord*".

4. Mr. G.K. Garg, learned counsel appearing for the defendant-appellant-tenant taking this Court through the pleadings and evidence led by the plaintiff as well as defendant, submitted that firstly, the plaintiff had failed to prove that Smt. Krishna Gupta was the tenant of the plaintiff, secondly, defendant No.2, Satya Narain Garg was put in possession of the suit property right from day one and, therefore, there was no question of Smt. Krishna Gupta, assuming for argument sake that she was tenant of the plaintiff-landlord, parting with the possession in favour of defendant No.2, Satya Narain Garg, who was the person who paid the rent to the plaintiff-landlord as was clear from the receipt (Ex.1) and he was looking after the business of tenant right from day one of the tenancy and, therefore, learned trial Court could not have decreed the suit of eviction on the ground of assignment, sub-letting or parting with the

possession. He urged that while the learned trial Court rightly found that no case of sub-letting was made by the plaintiff while deciding issue No.6, but it had fallen into error while holding that defendant No.1, Smt. Krishna Gupta, had parted with the possession to defendant No.2, Satya Narain Garg and thus, granting the decree of eviction. He submitted that the defendant had not only stated in his written statement in Paras 1 and 8 that both Smt. Krishna Gupta and he were the joint owners of the business firm M/s. Mala Tiles of which he became the sole proprietor w.e.f. 8.8.1975, and in the witness given before the learned trial Court also the defence witnesses had so clearly stated before the trial Court and thus, there was no question of parting with the possession in favour of a person, who was already in possession, namely, defendant No.2, Satya Narain Garg. He, thus, urged for setting aside the impugned decree of eviction.

5. Mr. G.K. Garg, learned counsel for the appellant, relied upon the following judgments in support of his submissions :-

1. Jagan Nath Vs. Chander Bhan (1988) 3 SCC 57
2. Amir Ahmed Vs. Yusuf 1985 (1) WLN 550
3. Mahavir Prasad Verms Vs. Dr. Surinder Kaur 1982 (2) ACJ 205
4. Md. Salim Vs. Md. Ali (1987) 4 SCC 270

5. Gulam Mohammed Vs. Kishanlal 1975 WLN 207

6. Smt. Shanti Devi Vs. Puran Chand and Others 1975 ACJ 651
7. Madhavlal Vs. Smt. Govindi Bai 1971 RLW 64

8. Manchharam Sobhraj Vs. Jamnadas Mulchand AIR 1976 Gujarat 47
9. The Punjab Handloom Weavers Apex Co-operative Society Vs. Smt. Gian Wati 1971 AIRCJ 291

10. Gundalapalli Rangamannar Chetty Vs. Desu Rangiah AIR 1954 Madras 182

6. In **Jagan Nath Vs. Chander Bhan and Others** (supra), the Hon'ble Supreme Court laid down that there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. In that case even the tenant-father had retired from the business of Hindu undivided family and the sons had been looking after the business, it cannot be said that the father had divested himself of the legal right to be in possession upon his retirement. If the father was carrying on the business with his sons and the family was a joint Hindu family, and the father has a right to displace the possession of the occupants, i.e, his sons, it is difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Act.

This case is distinguishable on the facts because it was a case of joint Hindu family's business and his sons, who were looking after the business continued to look after the same business despite retirement of the father. The possession be ***de-facto*** and right of possession ***de-jure*** of the father continued despite such retirement and, therefore, the said judgment would not apply to the present case, which is a case of transfer of business by a sale deed on 8.8.1975 though to a close relative.

7. The Division Bench of this Court in **Amir Ahmed Vs. Yusuf** (supra) held that where a tenant allows another person to use merely the premises or part of the premises, he cannot be said to have parted with possession of the premises or part of the premises. The conversion of exclusive possession of the premises by the tenant into a joint possession of the premises by the tenant and a third person, does not constitute parting with possession under Section 13(1)(e) of the Act.

As a matter of fact, the ratio of this judgment would support the case of the plaintiff in the present case because here it is not a case of conversion of exclusive possession by the tenant into a

joint possession, but it is a case of joint possession converted into exclusive possession of defendant No.2, Satya Narain Garg. Therefore, the said judgment would go to help the case of the plaintiff rather than the defendant-appellant.

8. In **Mohd. Salim Vs. Mohd. Ali** (supra), the Hon'ble Supreme Court dealt with a case of agreement between a tenant and alleged sub-tenant conferring right on the appellant sub-tenant to manage or look after the existing business of the tenant in the suit premises for a specified period and enjoining the appellant to make fixed monthly payments to the tenant. In the absence of provision in the agreement for parting of exclusive possession of the premises, it was held that the agreement was one for management of the tenant's business only and, therefore, the appellant could not be held to be a sub-tenant and he would be bound by a decree of eviction passed against the tenant.

This case is also clearly distinguishable on facts as there was no such agreement of business for the specific monthly payment by the manager to the tenant and on the other hand, defendant No.2, Satya Narain Garg claimed to be joint owner of the firm M/s. Mala Tiles though he did not place any evidence on record before the trial Court

showing any partnership or something like that in the said M/s. Mala Tiles right from 1971. On the contrary evidence on record clearly shows that he was a merely power of attorney holder of defendant No.1, Smt. Krishna Gupta, right from 1971 and it is only on 8.8.1975 when he purchased the said business of M/s. Mala Tiles from defendant No.1, Smt. Krishna Gupta through a sale deed dated 8.8.1975, that he came in exclusive possession as owner of the business. The said sale deed dated 8.8.1975, which was in the exclusive and specific knowledge of the defendant Nos.1 and 2, were not placed before the learned trial Court for the reasons best known to them.

9. The case of **Smt. Shanti Devi Vs. Puran Chand & Ors.** of Punjab and Haryana High Court (supra) relied upon by learned counsel for the appellant laid down that there cannot be sub-letting without the lessee parting with the legal possession of the demised premises. The real test to determine sub-letting is whether the tenant has walked out of the demised premises and has handed over its exclusive possession and control to the sub-tenant. A tenant is entitled to use the demised property for any business he likes and if he takes someone as partner in his business the partner does not get the right of tenancy and cannot claim the status a tenant or sub-tenant.

Since in the present case, there is no argument raised by either of the parties on the ground of sub-letting, but have argued only on the ground of parting with the possession, the said judgment relied upon by learned counsel for the appellant is of no avail to him.

10. The next case of **Madhavlal Vs. Smt. Govindi Bai** (supra) wherein the learned Single Judge of this Court held that where tenant put his nephew in possession of part of shop where nephew living jointly in food and business with tenant, it was held that there was no sub-letting.

Obviously, the facts of the said case are clearly different and, therefore, the ratio of this case does not apply to the present case, nor as already stated, the ground of sub-letting is pressed by either of the parties.

11. On the side opposite, Shri S.M. Mehta, Sr. Adv. assisted by Mr. Anil Mehta, learned counsel for the respondents, urged that there is overwhelming evidence on record including the admission of the defendants that Smt. Krishna Gupta was the proprietor of the said Firm – M/s. Mala Tiles in whose tenancy was created by the plaintiff-

landlord and the defendant No.2, Satya Narain Garg, was only a power of attorney holder of Smt. Krishna Gupta, who looked after her business and on 8.8.1975 only he clearly became the sole owner by purchase of the said business of M/s. Mala Tiles from Smt. Krishna Gupta as she shifted with her husband from Ajmer, who was in a Government job and thus, on 8.8.1975 there was an admitted parting of possessing by the said Smt. Krishna Gupta in favour of Satya Narain Garg as their legal relationship was distinct and different from their family relationship and since the said parting of possession was without consent of the plaintiff-landlord, the suit for eviction was rightly decreed by the learned trial court and the present appeal of the defendant deserves to be dismissed by this Court.

12. Mr. S.M. Mehta relied upon the notice (Ex.1) given by the plaintiff-landlord to Smt. Krishna Gupta (proprietor of M/s. Mala Tiles) in which the landlord clearly stated that she had not paid rent after six months for the suit premises and the initial payment of rent of Rs.1,050/- was received from “your attorney Shri Satya Narain Garg” on 16.7.1971 and thereafter, Ex.2 – reply of the said Smt. Krishna Gupta also clearly stated that Shri Satya Narain Gar was looking after “my business and keeping all accounts of M/s. Mala Tiles with him in the capacity of my attorney and he would pay the arrears of rent,

which are due from 16.1.1972". Ex.3, notice, was given by the counsel for the plaintiff, Mr. Ishwar Manghani, Advocate on 1.12.1977 in Para 4 of which also, it was stated that "you both have failed to make any payment towards rent with the result that rent for the period from 16.1.72 to 15.11.77 amounting to Rs.12,250/- has become due from your both" and in reply thereof vide Ex.4 dated 15.7.1978, the Advocate for defendant No.1, Smt. Krishna Gupta, stated in Para 1 itself that "M/s. Mala Tiles is tenant in the premises and Shri Satya Narain Garg, who is the sole Proprietor of the said firm since 8.8.75 is alone liable to pay all rental arrears of the premises to you". In para 6 of the said reply, it was admitted that "as per sale deed dated 8.8.75 had sold the business of M/s. Mala Tiles to Shri Satya Narain Garg". D.W.1 Satya Narain Garg himself in his cross-examination admitted that in the registration with the Sales Tax Department and Small Scale Industries, Smt. Krishna Gupta was Proprietor of the said M/s. Mala Tiles and I was only a power of attorney holder. The same was corroborated by D.W.2, Kailash Narain Gupta, husband of the defendnat No.1, Smt. Krishna Gupta that Smt. Krishna Gupta was owner of the said Firm – M/s. Mala Tiles. D.W.3 was also supported the said version.

13. Mr. Mehta, learned counsel for the respondents relied upon

the following judgments in support of his submission:-

In **Mohammedkasam Haji Gulambhai Vs. Bakerali Fatehali (1998) 7 SCC 608**, the Hon'ble Supreme Court has held as under:-

> “On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on the tenant from sub-letting, assignment or disposition of his interest in the tenanted premises.
>
> Clause (e) of Section 13(1) of the Bombay Rent Act is couched in the widest terms. There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises.
>
> In the present case there is no ambiguity in the pleadings and the landlord filed a suit for eviction on the ground that B had unauthorizedly and unlawfully sub-let the premises or assigned or transferred in any manner his interest therein. The facts do not show that B could exercise his power throughout the suit premises at his pleasure to the exclusion of his two sons who were running their business in partnership there and it cannot be said that he continued to exercise control over the suit premises. B had no concern with the partnership business now being carried on under the new partnership deed in the suit premises. In the absence of records of the partnership business which the respondents failed to produce, it has to be presumed that rent was paid by one of the sons of B in the new partnership from the partnership account. Later

> the sons of B who were in complete control of the suit premises and were exercising exclusive possession over the same to the exclusion of B. That B would occasionally visit the shop premises does not advance the case of the respondents that he could exercise his rights over the shop premises.
>
> Therefore, on facts and in the circumstances the case of the appellant falls within the provisions of clause (e) of sub-section (1) of Section 13 of the Act entitling him to a decree of eviction against the respondents".

In the aforesaid case, the judgment relied upon by learned counsel for the defendant-appellant in the case of **Jagan Nath Vs. Chander Bhan** (supra) was distinguished by the Hon'ble Supreme Court. This case clearly supports the case of the respondent-plaintiff that where the B had withdrawn from the exclusive possession over the suit premises, he fell within the mischief of Section 13(1)(e) of the Act even though the business was carried on by his sons by way of a partnership. In the present case, the fact of sale of business by Smt. Krishna Gupta to Shri Satya Narain Garg on 8.8.1975 is admitted by the defendant himself and, therefore, he got the exclusive right of possession over the suit premises to the exclusion of seller Smt. Krishna Gupta on 8.8.1975 and thus, obviously there was a parting of possession by Smt. Krishna Gupta in favour of Shri Satya Narain Garg on 8.8.1975. His earlier looking after of business as power of attorney holder of Smt. Krishna Gupta from 1971 to 8.8.1975 cannot be said to

be his joint possession over the suit premises as a partner or co-owner as there was no evidence to this effect led by the defendant.

14. In **Bharat Sales Ltd. Vs. Life Insurance Corporation of India (1998) 3 SCC 1**, the Hon'ble Supreme Court has held that even proof of payment of monetary consideration by the sub-lessee to the tenant was not always necessary to establish sub-letting and in the cases of parting of actual physical and exclusive possession by tenant in favour of a third person behind the back of the landlord was indicative of sub-letting and such passing of the money consideration could even be presumed by the Court. The Hon'ble Supreme Court observed as under:-

> "Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. ***Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger of the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property***. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person

into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let".

15. In **M/s. General Radio & Appliances Co. Ltd. and Others Vs. M.A. Khader AIR 1986 SC 1218**, the Hon'ble Supreme Court dealing with a case of amalgamation of two companies under the orders of sanction of Scheme by High Court under the provisions of Companies Act, held that there will be a parting of possession in favour of amalgamated company by the transferor company and such transfer of tenancy by way of amalgamation scheme sanctioned by the High Court under the provisions of Companies Act would also be hit by Section 10(ii)(a) of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960. The Hon'ble Court held as under:-

"The transferee company which has been put in possession

of the tenanted premises by the transferor company which was tenant of the premises cannot be deemed to be tenant under the Act on the mere plea that the tenancy right in including the leasehold interest in the tenanted premises have come to be transferred and vested in the transfer company on the basis of the order of High Court on sanctioning the scheme of amalgamation of company made under Sections 391 and 394 of the Companies Act. Moreover when clause of the rent agreement executed by the transferor company expressly prohibited subletting of tenanted premises without express consent of the landlord, the transfer of the interest of the transferor company including possession in respect of the tenanted premises under the order of the High Court without obtaining the written permission or consent of the landlord could be said to have been transferred to the transferee company in contravention of the provisions of the Act as well as in contravention of the terms and conditions of the said rent agreement thereby making the transferee company liable to be evicted from the tenanted premises".

16. In **Kailash Chander Vs. Om Prakash (2003) 12 SCC 728,** where the tenant claimed that in a non-residential premises where the tenant (respondent No.1) carrying cloth business in the front portion of the premises and in the rear portion partitioned by wooden frame/plank his son (respondent No.2) carrying on activities as UTI agent and his son was not in exclusive possession but was in permissive possession, yet the Court held that when the appellant-landlord established the fact that respondent No.2 was carrying on his activities as UTI agent in the part of the premises exclusively, it was for the respondent to establish that his possession on that premises was not as a sub-tenant, which he failed to do. Merely because

respondent No.1 is father of respondent No.2, there cannot be any justification to say that it was not a case of sub-letting.

17. Therefore, learned counsel for the respondent-landlord submitted that in the present case, the case of parting of possession was clearly established by the plaintiff-landlord and the decree of eviction deserves to be upheld by this Court.

18. Having considered the rival submissions of the parties and upon perusal of the pleadings and evidence on record and having given my thoughtful consideration to the judgments cited at the bar, this Court is of the opinion that the present appeal filed by the defendant has no force and the same deserves to be dismissed.

19. The evidence on record clearly establishes that defendant Nos.2, Satya Narain Garg, was merely acting as a power of attorney holder of defendant No.1, Smt. Krishna Gupta, Proprietor of M/s. Mala Tiles and merely because the said power of attorney holder paid the rent for six months under Ex.1 – Receipt in the name of M/s. Mala Tiles through Shri Satya Narain Garg, it does not prove that he was the tenant with the said property. On the own admission of the defendant that he was only a power of attorney holder and the fact

that Smt. Krishna Gupta was Proprietor of the said M/s. Mala Tiles has never been rebutted by any of the defendant before the trial Court and on the contrary in the statements of D.W.1, D.W.2 and D.W.3, they have consistently admitted before the learned trial Court that earlier Smt. Krishna Gupta was the owner of the said M/s. Mala Tiles and later on, w.e.f. 8.8.1975 Shri Satya Narain Garg became the sole Proprietor of the said Firm under a sale deed, it was a clear case of assignment by the defendant No.1, Smt. Krishna Gupta to defendant No.2, Shri Satya Narain Garg. The said sale deed was not produced before the learned trial Court for the reasons best known to them, which was in possession of the defendants. The plaintiff-landlord could not be expected to produce the same. Merely because, the defendant No.2, Shri Satya Narain Garg was carrying on the business as a power of attorney holder of Smt. Krishna Gupta even from day one of tenancy, he cannot be said to be in legal possession of the property as a tenant. The legal relationship between defendant No.1 and defendant No.2 was quite different and distinct from their family relationship was that of a Proprietor and her power of attorney holder. If the said defendant No.2 was in possession as a joint owner with Smt. Krishna Gupta as argued by learned counsel for the appellant, there would have been some evidence led by the defendants that either it was under some partnership or otherwise. If he was already the owner of the said

concern M/s. Mala Tiles, where was the question of purchase of the said business from Smt. Krishna Gupta under a sale deed on 8.8.1975 as admitted by the defendants in the various documentary evidence as well as their statements before the learned trial Court. Once, it is beyond the pale of doubt that there was a purchase of the business Firm - M/s. Mala Tiles by the defendant No.2, Shri Satya Narain Garg on 8.8.1975 from Smt. Krishna Gupta, it is clear that it is this date i.e. 8.8.1975 on which the said defendant No.2, Shri Satya Narain Garg comes into exclusive possession of the demised premises to the exclusion of defendant No.1, Smt. Krishna Gupta. This was admittedly done without consent of the landlord and at the back of the plaintiff-landlord.

Therefore, obviously there was a parting of possession by the tenant, Smt. Krishna Gupta in favour of defendant No.2, Shri Satya Narain Garg without the consent of the landlord and, therefore, it fell within the mischief of Section 13(1)(e) of the Rajasthan Rent Control Act, 1950. On the basis of the judgments relied upon by learned counsel for the respondent-plaintiff-landlord, it is clear that the decree of eviction granted in favour of the plaintiff-respondent in the present case is unassailable on the ground of parting the possession. The judgments on the other hand relied upon by learned counsel for

the defendant-appellant are distinguishable and the reasons of distinction have already been discussed above while discussing the said judgments relied upon by learned counsel for the appellant.

20. For the reasons given above, the present appeal filed by the defendant-appellant is liable to be dismissed and the same is, accordingly, dismissed with no order as to costs.

[**Dr. Vineet Kothari**],**J.**

S.S.
**Jr.P.A.**